## SELF-DEFENCE AGAINST NON-STATE ACTORS

In this book, self-defence against non-State actors is examined by three scholars whose geographical, professional, theoretical, and methodological backgrounds and outlooks differ greatly. Their trialogue is framed by an introduction and a conclusion by the series editors. The novel scholarly format accommodates the pluralism and value changes of the current era, a shifting world order with a rise in nationalism and populism. It brings to light the cultural, professional and political pluralism which characterises international legal scholarship and exploits this pluralism as a heuristic device. This multiperspectivism exposes how political factors and intellectual styles influence the scholarly approaches and legal answers. The trialogical structure encourages its participants to decentre their perspectives. By explicitly focussing on the authors' divergence and disagreement, a richer understanding of self-defence against non-State actors is achieved, and the legal challenges and possible ways ahead are identified. This title is also available as open access on Cambridge Core.

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*Max Planck Institute for Comparative Public Law and International Law*

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*Max Planck Institute for Comparative Public Law and International Law*

# Self-Defence against Non-State Actors

**Volume 1**

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# Contents

# Introduction to the Series: Trialogical International Law

Anne Peters*

This book is the inaugural volume of the series 'Max Planck Trialogues on the Law of Peace and War'. The books in this series each treat one single topic in the area of the law surrounding armed conflict (*ius contra bellum*, *ius in bello* and *ius post bellum*). The volumes take up classical subjects but will also react to recent challenges. The idea is that within one book, the chosen topic is examined by three scholars whose geographical, professional, theoretical, and methodological backgrounds and outlooks differ greatly. They write on one and the same issue, approaching it from their own distinct perspective, and responding to each other.

The objective is to bring to light the cultural, professional, and political pluralism which characterises international legal scholarship, and to exploit this pluralism as a heuristic device. So the core method of the 'Max Planck Trialogues on the Law of Peace and War' is to positively acknowledge the diversity of perspectives, and to make constructive use of them (multiperspectivism). The direct meeting of divergent views should expose – more clearly than the usual business of argument and response in separate publications – that and how the political as well as regional factors and accompanying intellectual styles influence the scholarly approach taken and the legal answers given. By inviting the participants of the Trialogue to a conversation, and by explicitly focussing on their divergence and disagreement (or their complementarity and synergies), a decentring of perspectives might be facilitated. This should ultimately contribute to a richer understanding of the set of international legal questions tackled in each volume.

The Trialogue format suggests itself in the law surrounding armed conflict, because this field of international law is characterised by deep controversies.

* The author thanks Dr Christian Marxsen and the participants of the research seminar at the Max Planck Institute for Comparative Public Law and International Law for helpful comments on a prior version of this text.

It touches the core principles of international law and relates to questions which are existential for States. The exact balance that is struck between, for example, sovereignty and human rights, or between the territorial integrity of one State and the security concerns of another, directly affects the material interests of States. Thus, the legal choices to be made are deeply value-loaded and connect to underlying political and theoretical preferences. This diversity of opinions and assessments cannot be easily reconciled, nor can 'correct' solutions be found by means of doctrinally exact and rigid legal scholarship. Rather, the divergent legal assessments of situations surrounding armed conflicts are, as a matter of fact, profoundly rooted in the plurality of theoretical and practical approaches that can be found in the reality of international relations. Such plurality also governs and should continue to govern scholarly approaches.

But I submit that this praise of pluralism does not contradict or overtake the scholarly ideal of intersubjective comprehensibility. Academic works aim, or at least should aim, for universal intersubjective comprehensibility, allowing scholars with diverging geographical, educational, or theoretical backgrounds to understand an argument or a research finding – regardless of sex, nationality or religion. Global intersubjectivity in turn requires a transnational academic legal discourse whose participants accept that arguments are sound only if they are fit for universal application. But of course the global inter-subjective comprehensibility and replicability depends on the premises and methods, which first of all should be made the explicit object of scholarly reflection. The purpose of the Trialogue is exactly to do this job.

## I. THE PLURALISTIC STRUCTURE AND SELF-CONTRADICTORY SUBSTANCE OF INTERNATIONAL LAW

It is a truism that international law is in structural terms 'pluralistic', being

> *fragmented* (with no necessary coherence across international law as a whole), *decentralized* (where many centres and processes exist to create and interpret law), *contingent* (norms do not exist *a priori* but emerge from an engagement with the particular circumstances of their invocation, including agents and context), and *deliberative* (law is not so much a series of commands as a space in which meaning is collectively created in relation to social practices).[1]

[1] René Provost, 'Interpretation in International Law as a Transcultural Project', in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds.), *Interpretation in International Law* (Oxford: Oxford University Press, 2015), 290–308 (304) (emphasis in original).

Besides possessing these peculiar structural features, the content or substance of international law is marked by internal tensions and even contradictions. These are more pronounced than is usual in domestic legal orders. The reasons partly overlap with the pluralistic structure just mentioned. They are the absence of a unitary law-maker, the diplomatic technique of drafting treaty texts vaguely and ambigiously in order to facilitate agreeement, the multiplicity of law-interpreting actors, the scarcity of case-law that could clarify and settle understandings, and the lack of an apex court to harmonise the law. An important factor is also international law's evolution through accretion, in which new layers of legal principles and mechanisms have been added on top of older ones without being able to clear the table of the remnants of the old. The law of self-defence is a good example.[2] One of its precursors is the police-type action against criminals and pirates (itself a survivor of the mid-nineteenth century) which only partly occurred outside the territory of the reacting State, and which was often taken against foreign ships on the high seas. The legal good protected then was typically the lives and property of nationals – as opposed to national security looked after by national self-defence in the modern sense. Also, the legal consequence was distinct: the use of force was excused or tolerated as opposed to fully justified. The remnants of mid-nineteenth century police-type action against pirates and other criminals continue to fester and, one might say, 'infect' (in any case confuse) the contemporary debate on self-defence.

Martti Koskenniemi has argued that the 'fluidity' resulting from the said tensions are a crucial factor of the success of international law because they contribute not only to its factual acceptance by the participants whose interests and preferences diverge so starkly, but even to the normative acceptability of international law.[3] Both the pluralistic structure of international law and the

[2] Tadashi Mori, *Origins of the Right of Self-Defence in International Law: From the Caroline Incident to the United Nations Charter* (Leiden/Boston, MA: Brill Nijhoff, 2018), passim.

[3] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambrige: Cambridge University Press, 2nd edn., 2005), 590: 'The articulation of the experience of fluidity … [of the international legal discourse] is much stronger (and in a philosophical sense, more "fundamental") [than mere semantic openness] and states that even where there is no semantic ambivalence whatsoever, international law remains indeterminate because it is based on contradictory premises and seeks to regulate a future in regard to which even single actors' preferences remain unsettled. To say this is not to say much more than that international law emerges from a political process whose participants have contradictory priorities and rarely know with clarity how such priorities should be turned into directives to deal with an uncertain future.' Koskenniemi's point is 'not that all of this should be thought of as a scandal or (even less) a structural "deficiency" but that indeterminacy is an absolutely central aspect of international law's acceptability' (*ibid.*, 591).

'fluidity' of international legal argument can be teased out and better understood through a trialogical method, as shall be explained now.

## II. MULTIPERSPECTIVISM

The Trialogue-method builds on critical legal studies to the extent that those have recognised '*problems of perspective* as a central and determinative element in the discourse' of law.[4] International law is (as is all law) a social fact which is continuously and recursively created by social agents.[5] International law exists first of all in the beliefs and through the meaning ascribed to acts of law-makers and law-appliers. (These acts may then have physical manifestations which produce significant physical effects. For example, bombing a site under the heading of self-defence will destroy buildings and lives.)

Philosophers of science have long asserted that scientific findings are influenced by the perspective of the researcher.[6] For example, Hilary Putnam has claimed that '[t]here is no God's Eye point of view that we can know or usefully imagine', but only 'the various points of view of actual persons reflecting various interests and purposes that their descriptions and theories subserve'.[7] Notably, feminists have further developed this insight into a standpoint epistemology which endorses situated knowledge(s)[8] and thus seeks to avoid a 'totalising' single vision, on the one hand, and a sterile and unsustainable epistemic relativism, on the other.[9]

Along these lines of thought we must acknowledge that legal concepts to some extent depend on the (diverging) perspectives of those who create, apply,

[4] Günter Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law', *Harvard International Law Journal* 26 (1985), 411–55 (411) (emphasis added; with a view to comparative law, not international law).

[5] Anthony Giddens has called this 'structuration'. According to Giddens, social structures are created recursively. They result from patterns in agency, which are constrained by social structures, which result from agency, and so on. In and through their activities agents reproduce the conditions that make these activities possible. See Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Cambridge: Polity Press, 1984), 2. I thank Tom Sparks for this reference.

[6] Gert König, 'Perspektive, Perspektivismus, perspektivisch, I. Philosophie; Theleologie; Geistes- und Naturwissenschaften', in Joachim Ritter, Karlfried Gründer and Gottfried Gabriel (eds.), *Historisches Wörterbuch der Philosophie* (Basel: Schwabe & Co. AG Verlag, 1989), vol. VII, 363–75.

[7] Hilary Putnam, *Reason, Truth and History* (Cambridge: Cambridge University Press, 2nd edn., 1997), 50.

[8] Seminally, Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective', *Feminist Studies* 14 (1988), 575–99.

[9] See for a short and accessible refutation of epistemic relativism, John Searle, 'Why Should You Believe It?', *The New York Review of Books*, vol. 56, no. 14 (24 September 2009).

interpret and criticise the law. Law is therefore inevitably a multi-perspectival phenomenon. Kaarlo Tuori has spelled this insight out for transnational (or international) law:

> [P]erspectivism is an inherent feature of all law. Legal actors always approach the law from a particular perspective, which inevitably affects what they identify as law and how they interpret and apply it … Law exists only as identified and interpreted by situated legal actors: that is, legal actors embedded in a particular social and cultural context. Although a general characteristic of law, perspectivism is particularly pronounced in transnational law … This is due to the great variety of legal actors and the great variety of the situatedness of these actors.[10]

The Trialogues seek to build on and take advantage of this perspectivism. Their multiperspectivism highlights 'the importance of seeing international law and international issues through the eyes of others'.[11] The trialogical setting seeks to encourage situated participants to become more sharply aware of how some arguments might be viewed differently from another perspective. This approach aligns with Yasuaki Onuma's call for a 'transcivilization perspective', which the Japanese scholar defined as follows:

> The transcivilizational perspective is a perspective from which people see, sense, (re)cognize, interpret, assess, and seek to propose solutions for the ideas, activities, phenomena and problems transcending national boundaries by adopting a cognitive and evaluative framework based on the recognition of the plurality of civilizations and cultures that have long existed throughout history … The transcivilizational perspective sounds new, but it is not. It is a re-conceptualization of an already existing perspective from which people see trans-boundary or global affairs in terms of civilizations, including cultures and religions.[12]

The Trialogues are a conscious attempt to pluralise the relevant interpretive communities[13] around concrete international legal problems. This scheme acknowledges 'the polycentric and polyphonic nature of the interpretive

[10] Kaarlo Tuori, *European Constitutionalism* (Cambridge: Cambridge University Press, 2015), 78.

[11] Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017), 320.

[12] Yasuaki Onuma, *International Law in a Transcivilizational World* (Cambridge: Cambridge University Press, 2017), 19–20.

[13] Stanley Fish, *Is There a Text in this Class? The Authority of Interpretive Communities* (Cambridge, MA: Harvard University Press, 2nd edn., 1982). See, for the application of this concept to the interpretation of international treaties, Ian Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities', *Michigan Journal of International Law* 12 (1991),

process in international law'.[14] Indeed, the three voices in a Trialogue might be in harmony or in dissonance. Inevitably, the polyphony (to stick to the image) is less pronounced than ideal because the Trialogues are conducted in English. This language comes with a certain, historically impregnated writing and speaking style and carries the baggage of legal concepts stemming from the various English-speaking national traditions. It might even promote the trend towards a more case-oriented, less systematic, in short 'Anglo-Saxon' style of legal reasoning. For sure, its use is a significant competitive disadvantage for non-native speakers. Being aware of the cultural losses caused by English monolingualism, also in the Trialogue exercise, we do not see a feasible alternative.[15] We nevertheless hope to uphold some degree of transculturalism in the Trialogues.

The trialogical method bears a family resemblance with René Provost's 'interpretation in international law as a transcultural project'. Provost has concluded that the pluralistic nature of international law forces us to recognise pluralistic interpretive communities as well. He suggests 'that approaches relying on a concept such as *the* interpretive community fail to support the normative claim embodied in international law. Instead, a thicker understanding of the interpretive process projects a pluralistic construction of international law that can more accurately capture the promise and limits of that regime.'[16] The intention of the Trialogues is to beef up the interpretive process in that sense.

## III. THE TIMING OF THE TRIALOGUES: PRESSURE ON INTERNATIONAL LAW'S UNIVERSALITY

International law aspires to be universal but carries a historical baggage of Eurocentrism.[17] 'In a system with the limited heritage but universalist pretensions of international law', the 'importance of accomodating legal pluralism within international legal discourse' cannot be overstated.[18] This has

371–419. See further Andrea Bianchi, *International Law Theories: An Inquiry Into Different Ways of Thinking* (Oxford: Oxford University Press, 2016), 306.

[14] Provost, 'Interpretation in International Law as a Transcultural Project' 2015 (n. 1), 303.

[15] Gleider I. Hernández, 'On Multilingualism and the International Legal Process', in Hélène Ruiz Fabri *et al.* (eds.), *Select Proceedings of the European Society of International Law* (Oxford: Hart, 2010), vol. II, 441–60.

[16] Provost, 'Interpretation in International Law as a Transcultural Project' 2015 (n. 1), 303–4 (emphasis added).

[17] Bardo Fassbender and Anne Peters, 'Introduction: Towards a Global History of International Law', in Bardo Fassbender and Anne Peters (eds.), *Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), 1–24.

[18] Hernández, 'On Multilingualism and the International Legal Process' 2010 (n. 15), 457.

become all the more relevant in times of a global change of order.[19] Currently, the economic, political, military, and ideational dominance of the West is challenged not only by the rising States of the Global South and Asia but also by business enterprises, new regional organisations, and criminal networks which all unfold global action taking off from bases in various regions of the world.[20]

Because the international legal order 'feeds on preconditions which itself cannot guarantee'[21] (such as shared ethical norms, sufficient channels of communication, or the absence of unacceptable wealth disparities across the globe), it is inevitably affected by these changes. Most commonly, the macro-transformation of the international order is attributed to the ongoing redistribution and dispersion of political and economic power. But it also results from intellectual and moral factors which differ in the various regions of the world, ranging from resentment against 'Western' interference in the Middle East and Asia over the perception of being left behind and lack of prospects for a decent life in the Global South, up to the fear of losing privileges and wealth by the inhabitants of rich industrial States. The power shifts and the traction of anti-globalist ideas are likely to increase the ever-latent pressure on the universality of international law.[22] And if the international legal order feeds on preconditions which itself cannot guarantee, this means that international legal scholarship, too, must come to grips with pre-conditions and side-conditions over which it has no control.[23] Its methods must also react to changing environments.

[19] Charles A. Kupchan, *No One's World: The West, the Rising Rest, and the Coming Global Turn* (Oxford: Oxford University Press, 2013). For the consequences for international law William Burke-White, 'Power Shifts: Structural Realignment and Substantive Pluralism', *Harvard Journal of International Law* 56 (2015), 1–79.

[20] Rana Dasgupta, 'The Demise of the Nation State', *The Guardian*, 5th April 2018.

[21] See, with regard to States (the most powerful entities in the international legal order), Ernst Wolfgang Böckenförde's statement: 'Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann'; Ernst Wolfgang Böckenförde, 'Entstehung des Staates als Vorgang der Säkularisation', in *Säkularisation und Utopie: Ebracher Studien, Ernst Forsthoff zum 65. Geburtstag* (Stuttgart: Kohlhammer, 1967), 75–94 (93); reprinted in Ernst Wolfgang Böckenförde, *Recht, Staat, Freiheit: Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte* (Frankfurt a. M.: Suhrkamp, 1991), 92–114; an English translation is forthcoming in Mirjam Künkler and Tine Stein (eds.), *Religion, Law, and Democracy: Selected Writings of Ernst-Wolfgang Böckenförde* (Oxford: Oxford University Press, 2019).

[22] See Roberts, *Is International Law International?* 2017 (n. 11), 289.

[23] Anne Peters, 'The Rise and Decline of the International Rule of Law and the Job of Scholars', in Heike Krieger, Georg Nolte and Andreas Zimmermann (eds.), *The International Rule of Law: Rise or Decline?* (Oxford: Oxford University Press, forthcoming).

In our 'post truth age', the standpoint epistemology mentioned above[24] has been hijacked by right-wing parties and populists and has thereby muted the critical camps' emancipatory aspirations.[25] A reappraisal of the value and importance of an (at least procedural and discursive) legal universalism therefore seems urgent. At this juncture, the Trialogue-method actively embraces a culture-based moderate moral relativism as an appropriate attitude and as a useful starting point for scholarly debates in our pluralist, divided, multicultural world. It makes use of the 'situationality' of international legal actors. 'Situationality' expresses that the law-applier and law-interpreter are '*not absolutely constrained* by contexts and circumstances that can never be overcome' while steering away from 'falling into relativist particularisms or homogenising universalism'.[26] Utilising perspectivism and situationality, the Trialogues might modestly contribute to the attempt to build a bottom-up legal universalism without plunging into legal absolutism. Starting from the pragmatic assumption that people can make moral and learning experiences which force them to step out of the moral and epistemic framework they are used to, a Trialogue is one way to tease this out.

## IV. PROBLEMATISING NATIONAL PERSPECTIVES ON QUESTIONS OF THE LAW *CONTRA BELLUM* AND *IN BELLO*

The different nationalities of the Trialogue participants are not their only marker of diversity, but they are an important one. We invite authors with different national backgrounds because we acknowledge that the domestic legal training, the domestic legal culture, and the political (often regionally informed) worldview of scholars influences their approach to international legal problems. In this regard, the Trialogues are in line with the current investigations into 'comparative international law' which include notably empirical research on the national education material, style and case-material used in textbooks, citation practices, and the like.[27]

[24] Haraway, 'Situated Knowledges' 1988 (n. 8).

[25] Albrecht Koschorke, 'Die akademische Linke hat sich selbst dekonstruiert. Es ist Zeit, die Begriffe neu zu justieren', *Neue Zürcher Zeitung*, 18 April 2018.

[26] Outi Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance Towards Culture, History and Community* (The Hague: Kluwer Law International, 2000), 8–10 (emphasis added).

[27] Roberts, *Is International Law International?* 2017 (n. 11). Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier and Mila Versteeg (eds.), *Comparative International Law* (Oxford: Oxford University Press, 2018). The study of the reception of international law in the different legal orders of the world, and the shaping of international law by the different States is part of the original mission of the Max Planck Institute for Comparative Public Law and

By highlighting different nationally coloured approaches, the Trialogues seek to problematise 'epistemic nationalism'. With this I mean the twofold phenomenon that international legal scholars often espouse positions which can be linked to their prior education in their domestic legal system and/or which serve a national interest.[28] The first variant, thinking along one's familiar legal tradition, often occurs unconsciously, while the second variant, supporting one's home country, may happen either deliberately or unwittingly. A parallel issue is the persistent segregation of research institutions along national lines. It is for that reason, too, that we nowadays doubt that the 'invisible college of international lawyers', as invoked by Oscar Schachter in the 1970s,[29] is really a global college. It rather seems to be an elite college of scholars of the developed world, a college in which academics from the so-called Global South are relegated to the role of the eternal students.

I think that the exposure of the fragility of the universality of international legal scholarship is apt to contribute to the constant work of building and rebuilding a universal international law. This stands in contrast to the early twentieth century's scholarly quest for a radical detachment from one's national background. George Scelle, for example, had still linked the surpassing of the national (and in his time probably intensely nationalist) perspective to the object of his discipline: 'Scientific objectivity must dispel … every subjective point of view and, in particular, … every national point of view from legal education … The only ideal we should nurture is the objective of

International Law in Heidelberg. See for an original theoretical approach (without the empirical research programme) Mireille Delmas-Marty, 'Comparative Law and International Law: Methods for Ordering Pluralism', *University of Tokyo Journal of Law and Politics* 3 (2006), 43–59. See also Emmanuelle Jouannet, 'French and American Perspectives on International Law: Legal Cultures and International Law', *Maine Law Review* 58 (2006), 291–601; Martti Koskenniemi, 'The Case for Comparative International Law', *Finnish Yearbook of International Law* 20 (2009), 1–8. See with a focus on the Cold War claims of particular regional and strongly politicised approaches to international law (notably Soviet international law) Boris N. Mamlyuk and Ugo Mattei, 'Comparative International Law', *Brooklyn Journal of International Law* 36 (2011), 385–452.

[28] Anne Peters, 'Die Zukunft der Völkerrechtswissenschaft: Wider den epistemischen Nationalismus', *Heidelberg Journal of International Law* 67 (2007), 721–76; Anne Peters, 'International Legal Scholarship Under Challenge', in Jean D'Aspremont, Tarcisio Gazzini, André Nollkaemper and Wouter Werner (eds.), *International Law as a Profession* (Cambridge: Cambridge University Press, 2017), 117–59 (118–26).

[29] Oscar Schachter, 'The Invisible College of International Lawyers', *Northwestern University Law Review* 72 (1977), 217–26: '[T]he professional community of international lawyers … constitutes a kind of invisible college dedicated to a common intellectual enterprise.' The expression 'Invisible College' was used by Robert Boyle in 1646 in relation to a predecessor society to the *Royal Society*, which was founded in 1660 (see Robert Lomas, *The Invisible College* (London: Headline, 2002), 63; *The New Encyclopedia Britannica*, 32 vols. (Chicago, IL: Encyclopedia Britannica, 15th edn., 2002), vol. X, 220).

law itself, being an ideal in so far as it can never be attained: the creation of peace between human beings.'[30]

Speaking up against Scelle on this point, I suggest that while scholars of international law should avoid outright nationalism, it is not desirable and not even possible to clinically strip off their particular points of view which root in and are informed by specific educational backgrounds, political and cultural traditions, and a general embeddedness in national discourses. On the contrary, I think that scholars can and should proactively make use of their diverse backgrounds by enriching international legal scholarship with a comparative law dimension. The espousal of the Trialogues' participants' national *Vorverständnis* should ultimately contribute to working towards Scelle's ideal of peace.

## V. BOTTOM-UP UNIVERSALISATION

Presupposing that the *raison d'être* of international law is to govern relationships between political actors dispersed on the entire globe and to provide a common language and culture, international law must be universal (providing rules which apply to *all*). The fulfilment of the said functions requires distinguishing sharply between a welcome plurality of perspectives (including the possibility of diverging interpretations), on the one hand, and an undesirable plurality of *different rules* for different players even if these are similarly situated, on the other.

Take an example from the law on the use of force, the 'unwilling or unable' standard for identifying States from whose territory terror attacks have been launched and against which self-defensive action should then be allowed. It cannot be applied across the board. International order would be destroyed if *all* States (and not only the powerful ones which arrogate themselves the privilege to apply these standards against others) relied on it because this would lead to a very high rate of military activities by numerous States against numerous others.[31] This means that the 'unwilling or unable'

[30] Georges Scelle, *Précis de Droit des Gens: Principes et Systématique*, 2 vols. (Paris: Recueil Sirey, 1932), vol. I, ix. Author's translation of the original: 'L'objectivité scientifique doit bannir d'un enseignement juridique tout idéal extra-juridique, toute "croyance", toute aspiration affective, tout point de vue subjectif et, notamment, dans notre domaine, les points de vue nationaux –, tout sentiment en un mot, si élevé, si légitime ou si profond soit-il. Le seul idéal qu'on puisse contempler c'est le "but", idéal aussi, puisque jamais atteint, que se propose le Droit: l'établissement de la paix entre les hommes.'

[31] See Jutta Brunnée and Stephen Toope, 'Self-Defence against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?', *International and Comparative Law Quarterly* 67 (2018), 263–86 (285).

standard is not universalisable. It can only function if it is used very sparingly. This means *de facto* (due to the uneven technical and financial capacities of States) that it will result in a restraint and disciplining tool on many weak States (especially those in which significant terrorist groups are based) and as an empowering device of some States with the sufficient military capacities to strike. Such a multi-class or two-speed model of international law may be acceptable for very limited and select issues, or as a temporary device allowing for experimentation on a small scale, but should not be allowed to affect core principles of international law, because that would erode the quality of international law as a worldwide normative system. (For example, already the two-class regime of the Nuclear Non-Proliferation Treaty faces increasing scepticism.)

I submit that the aspiration to a discursive, procedural and bottom-up universalism in international legal scholarship is not logically or intrinsically a 'false' universalism which merely camouflages particular interests. This submission does not neglect or reject the critical analysis of the operationalisation of international law's claim to universality as a mode of power.[32] It is a historical fact that such hegemonic camouflage has often occurred and continues to happen not only in real international relations but also in scholarship – both in the discourse and in its outside features, for example in the way careers are managed and projects are organised and financed. Critical scholars such as Sundhya Pahuja find that 'even if the claim to universality is a familiar mode of power, it is nevertheless an unstable one, for it is always implanted with the seeds of its own excess.' But 'a universal orientation is unavoidable if there is to be law.'[33] Ultimately, Pahuja acknowledges, the universal and the particular depend on each other. They are constructed in relation to each other, leading to a 'critical instability' of international law.[34]

The conscious advertisement of multiperspectivism does not, in itself, call into question the necessity of universalising international law. Multiperspectivism might, on the contrary, be seen 'as not threatening international law but as contributing to its refinement'.[35] Mathias Forteau has pointed out with regard to the recently touted discipline of comparative international law that such an

[32] Sundhya Pahuja, *Decolonising International Law Development: Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011), 252–7.
[33] *Ibid.*, 41.
[34] *Ibid.*, 25.
[35] With a view to comparative international law: Mathias Forteau, 'Comparative International Law within, not against, International Law', in Roberts, Stephan, Verdier and Versteeg, Comparative International Law 2018 (n. 27), 161–79 (179).

> ecumenical conclusion depends heavily on the way diversity is approached. So far as diversity is assessed with the specific purpose of reaching a consensus on the definition of international, common rules, comparative international law harmoniously supplements international law. On the other hand, if comparative international law were to be designed as a way to claim the existence of specific approaches to international law, there is a risk that it would eventually lead to the disintegration of the core idea of international law as the common law humankind.[36]

More profoundly, multiperspectivism is distinct from espousing epistemic or moral relativism.[37] Multiperspectivism is independent from, or neutral towards, what Karl Popper has called the framework-theory (and the accompaniyng framework-relativism[38]). The framework-theory forms the backbone of critical legal theory. It holds that there is no external point of reference beyond the frameworks from which the meaning of words, the truth of propositions and the validity of ethical norms can be judged. Therefore, legal language, thought and judgment are trapped within inescapable epistemic, linguistic, cultural and moral frames of reference.[39] Frameworks are institutionalised so that researchers are dominated 'by a grid of concepts, research techniques, professional ethics, and politics, by which the prevailing culture imposes on the individual scholar

[36] *Ibid.*

[37] I cannot fully discuss the merits and problems of moral and epistemic relativism in this contribution. But I am sympathetic to discourse theory's attempt to demonstrate that engaging in a discourse implies recognition of some universal moral norms. See generally Karl-Otto Apel, *Transformation der Philosophie, vol. II: Das Apriori der Kommunikationsgemeinschaft* (Frankfurt a. M.: Suhrkamp, 1973), 400, 420–5; Jürgen Habermas, 'Diskursethik – Notizen zu einem Begründungsprogramm', in *Moralbewußtsein und kommunikatives Handeln* (Frankfurt a. M.: Suhrkamp, 1st edn., 1983), 53–125 (105). Jürgen Habermas, 'Erläuterungen zur Diskursethik', in *Erläuterungen zur Diskursethik* (Frankfurt a. M.: Suhrkamp, 2nd edn., 1992), 119–226 (195). See for an analysis and criticism of the philosophical foundations of Habermas' universal pragmatics Christian Marxsen, *Geltung und Macht – Jürgen Habermas' Theorie von Recht, Staat und Demokratie* (Munich: Wilhelm Fink, 2011), 68–88. See, for a brilliant application of discourse theory to the international legal discourse, Ingo Venzke, *How Interpretation Makes International Law* (Oxford: Oxford University Press, 2012).

[38] Karl Popper has defined framework-relativism as 'the doctrine that truth is relative to our intellectual background, which is supposed to determine somehow the framework within which we are able to think: that truth may change from one framework to another' (Karl Popper, *The Myth of the Framework: In Defence of Science and Rationality* (London: Routledge, 1994), 33).

[39] Seminally François Lyotard, *La Condition Postmoderne: Rapport sur le Savoir* (Paris: Édition de Minuit, 1979). Lyotard identifies as characteristics of the post-modern era the obsoleteness of meta-narrratives, which were in modern times used to legitimise institutions, social and political practices, ethics and modes of thought. From the obsoleteness of meta-narratives results the irresolvable incommensurability of language games, which make consensual notions of truth and justice impossible.

its canons of how legal scholarship is to be conducted'.[40] The gist here lies not in the hardly deniable proposition that throughout history and geography we have a plurality of epistemic, normative and cultural frameworks. The gist lies in the assertion that these frameworks are *incommensurable*.[41] The Trialogues attempt to test the alleged incommensurability in a real setting.

Moreover, a Trialogue can be seen as an exercise in intercultural hermeneutics[42] in which the conversation or 'dialogue' between the legal material (texts) and their readers (scholars)[43] is explicitly loaded with the concept of culture (including legal culture[44]), because the three readers are selected so as to represent different cultures. In interpreting the texts of international law (both the primary material, for example the treaties and soft law texts themselves, and the scholarly secondary material) the cultural 'Other' embodied therein is in principle not different from the intra-cultural or historical 'Other'. The cultural distance can be revealed, described and conveyed through interpretation. Intercultural hermeneutics thus presuppose, search, find and enlarge the overlaps between different cultures and philosophies. These overlaps make cross-cultural communication and understanding possible – also on questions of international law.[45] The Trialogues indeed aspire to identify the existence or absence of an 'overlapping consensus' on international legal principles.[46] It will remain to be seen whether the

[40] Günter Frankenberg, 'Stranger than Paradise: Identity and Politics in Comparative Law', *Utah Law Review* 2 (1997), 259–74 (270).

[41] See, for a critique of the incommensurability thesis, Anne Peters and Heiner Schwenke, 'Comparative Law Beyond Post-Modernism', *International and Comparative Law Quarterly* 49 (2000), 800–34.

[42] Elmar Holenstein, 'Intra- und interkulturelle Hermeneutik', in *Kulturphilosophische Perspektiven* (Frankfurt a. M.: Suhrkamp, 1998), 257–87. See for practical application Fred Edmund Jandt, *An Introduction to Intercultural Communication: Identities in a Global Community* (Los Angeles, CA: SAGE, 8th edn., 2016).

[43] See for a 'dialogical' (or 'conversational') hermeneutics Alexandra Kemmerer, 'Chapter 22: Sources in the Meta-Theory of International Law: Hermeneutical Conversations', in Samantha Besson and Jean D'Aspremont (eds.), *The Oxford Handbook on the Sources of International Law* (Oxford: Oxford University Press, 2017), 469–90. The dialogue or conversation mentioned is between the reader and the text, and points to the reader's self-reflexive posititioning in his/her changing environment (which includes the others members of the interpretive community).

[44] See, for a critical overview of the term's usage, Ralf Michaels, 'Rechtskultur', in Jürgen Basedow, Klaus J. Hopt and Reinhard Zimmermann (eds.), *Handwörterbuch des Europäischen Privatrechts* (Tübingen: Mohr Siebeck, 2009).

[45] Axel Horstmann, 'Interkulturelle Hermeneutik: Eine neue Theorie des Verstehens?', *Deutsche Zeitschrift für Philosophie* 47 (1999), 427–48 (438).

[46] See *mutatis mutandis* John Rawls, 'The Idea of an Overlapping Consensus', *Oxford Journal of Legal Studies* 7 (1987), 1–25 (Rawls conceptualised this for societies 'with a democratic tradition confronted by the fact of pluralism').

Trialogues make a contribution, in a discursive process, to universalising the legal ideas surrounding the *ius contra bellum* and *in bello*.

Ideally, this project could be complemented by anthropological research trying to ascertain the validity of moral norms empirically with a view to actual moral attitudes of people. Along this vein, Gregory Shaffer and the 'new legal realists' call for empirical, social-science based studies in order

> to uncover new vantages and perspectives through empirical engagement, *permitting our incoming predisposition (inevitable no matter how neutral we aim to be) to be challenged and potentially transformed* . . . This approach is particularly important for the analysis of international law in a world characterized by constituencies with differing priorities, perspectives, and opportunities to be heard in which the most read and influential international law scholarship tends to be written by those from particular backgrounds working in a particular language, English.[47]

Empirical studies are helpful to shake and challenge predispositions, but will do the job only if they are informed by a conceptual framework which proactively foregrounds pluralism. On the basis of such a conceptualisation and method, universalism would not be based on an *a priori* reasoning, but it would be an *ex post* universalism based on empirical data.[48]

## VI. CONTRIBUTING TO THE SELF-REFLEXIVITY OF INTERNATIONAL LEGAL SCHOLARSHIP

Scholars of international law should not harbour illusions about the relevance of their contributions to international law. They cannot make law – just as lepidopterists cannot make butterflies.[49] Because scholars have no law-making and no law-destroying authority themselves, it depends on the persuasiveness of their arguments whether these will be taken up by the political actors or not. But however weak the power of the argument is, academics have a (modest) role to play, not as architects of the international

[47] Gregory Shaffer, 'New Legal Realism and International Law', in Heinz Klug and Sally Engle Merry (eds.), *The New Legal Realism, vol. II: Studying Law Globally* (New York: Cambridge University Press, 2016), 145–59 (146) (emphasis added).

[48] See for an empirical study the World Values Survey, a global network of social scientists studying changing values and their impact on social and political life, available at www.worldvaluessurvey.org.

[49] Jörg Kammerhofer, 'Lawmaking by Scholars', in Catherine Brölmann and Yannick Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Cheltenham/Northampton, MA: Edward Elgar Publishing, 2016), 305–25 (305).

legal order but rather as 'caretakers' of the fragile autonomy and universality of international law.[50]

The Trialogues are in line with the current trend of increased self-circumspection of international legal scholarship, which may be taken as a sign of crisis but which probably helps to improve the enterprise.[51] The Trialogues might contribute to the self-reflexivity as called for by Andrew Lang and Susan Marks, who find that

> by showing how our professional sensibilities are entrenched, transmitted and propagated through disciplinary habits of thought, assumptions, and dispositions, we are brought face to face with the processes through which we are ourselves enrolled in, and shaped by, the collectively produced disciplinary structures we inhabit. This can encourage us to engage with these processes in a more reflexive and critical way.[52]

The direct confrontation in the Trialogue workshops is expected to provoke a 'comitted argument'[53] by the discussants, to borrow Owen Fiss' phrase. The set-up is more conducive to engaged scholarship than to armchair international law.

Michael Bohlander demonstrated how the language and different legal educations of the legal actors influence the operation of international criminal law, and he praised these influences as an asset: '[I]t would be dreadful if the entire human intellectual enterprise were to be guided by the same intellectual style.'[54] Along this line, the Trialogues should uphold intellectual 'stylistic' diversity and ultimately work against an intellectual monoculture.

[50] Richard Collins and Alexandra Bohm, 'International Law as Professional Practice', in D'Aspremont, Gazzini, Nollkaemper and Werner, *International Law as a Profession* 2017 (n. 28), 67–92 (88).

[51] D'Aspremont, Gazzini, Nollkaemper and Werner, *International Law as a Profession* 2017 (n. 28).

[52] Andrew Lang and Susan Marks, 'People with Projects: Writing the Lives of International Lawyers', *Temple International And Comparative Law Journal* 27 (2013), 437–53 (449).

[53] Owen Fiss, 'The Varieties of Positivism', *Yale Law Journal* 90 (1981), 1007–16 (1009).

[54] Michael Bohlander, 'Language, Culture, Legal Traditions, and International Criminal Justice', *Journal of International Criminal Justice* 12 (2014), 491–513 (21).